IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Case No. 8396.

FROZEN FOOD EXPRESS, et al.,
Plaintiff,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,
Defendants.

STATEMENT OF JURISDICTION OF THE CLASS I RAILROADS, INTERVENING DEFENDANTS.

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EDWIN N. BELL,
JOSEPH H. HAYS,
CARL HELMETAG, JR.,
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Filed: June 17, 1955

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INTERSTATE COMMERCE COMMISSION, ET AL.,
Defendants.

In compliance with Rule 13, paragraph 2, of the Revised Rules of the Supreme Court of the United States, the Appellant Class I Railroads (intervening defendants in the above-styled action), hereinafter referred to as Railroads, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order and judgment of the District Court of three judges entered in this cause. A list of the individual defendant railroads is attached hereto as Appendix A.

OPINION BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division, has not yet been reported. Copies of the opinion and final judgment are attached hereto as Appendix B-1 and B-2, respectively.

JURISDICTION

(1)

This proceeding was instituted to enjoin and set aside certain orders of the Interstate Commerce Commission, pursuant to the requirements of 5 U. S. C. A. § 1009, 28 U. S. C. A. §§ 1336, 1398, 2321-2325 and 49 U. S. C. A. § 305(g). The cause was heard by a District Court of the three judges in accordance with the requirement of 28 U. S. C. A. § 2325.

(2)

The Court below enjoined and restrained the Interstate Commerce Commission from enforcing its order in *East Texas Motor Freight Lines, Inc. v. Frozen Food Express*, Docket No. MC-C-1605 (July 13, 1954), insofar as it interferes with or restrains the transportation by Frozen Food Express of fresh and frozen poultry in interstate commerce in vehicles not used for carrying any other persons or property for compensation. Similar relief sought by plaintiff in respect to fresh and frozen meat was denied. A Notice of Appeal was filed in the United States District Court for the Southern District of Texas, Houston Division, on April 19, 1955, from that portion of this judgment which restrains the Commission from enforcing its order in *East Texas Motor Freight Lines, Inc. v. Frozen Food Express*, in respect to the transportation by Frozen Food Express of fresh and frozen dressed poultry.

(3)

Jurisdiction of a direct appeal from the judgment of a three-judge district court is vested in the Supreme Court by Statute. 28 U. S. C. A. §§ 1253 and 2101(b).

(4)

Such jurisdiction of the Supreme Court is also established by cases such as *United States v. B. & O. R. Co.*, 333 U. S. 169 (1948) and *I. C. C. v. Hoboken R. Co.*, 320 U. S. 368 (1943).

QUESTIONS RAISED ON APPEAL

Whether the district court was in error in holding that
sh and frozen dressed poultry are "agricultural com-
dities" and not "manufactured products thereof" within
meaning of Section 203(b)(6) of the Interstate Com-
rce Act (49 U. S. C. A. 303(b)(6))?

Whether the district court, in enjoining enforcement
and setting aside so much of the Commission's Order
relates to fresh and frozen dressed poultry, was in error
failing to give adequate weight to the interpretation
ven by the Interstate Commerce Commission to Section
3(b)(6) of Part II of the Interstate Commerce Act in
w of the fact that the Commission has been given ex-
sive responsibilities by the Congress of the United
ates of America in the interpretation and administration
the Act so as to promote sound conditions in transporta-
n in conformity with the objectives of the National
ansportation Policy?

STATEMENT OF CASE

This proceeding had its inception in a complaint which was filed with the Interstate Commerce Commission by three motor common carriers against Frozen Food Express alleging that the defendant was engaging in the transportation of fresh and frozen meat and fresh and frozen dressed poultry between points not authorized by any certificate held by it. The complaint asked that defendant be ordered to desist from such unlawful operation. Defendant, Frozen Food Express, defended on the ground that the transportation of the commodities complained of came within the agricultural exemption.

After considering the case upon stipulated facts, the Commission concluded, in a proceeding entitled *East Texas Motor Freight Lines, Inc. v. Frozen Food Express*, Docket No. MC-C-1605 (July 13, 1954), that none of these commodities was within the exemption of Section 203(b)(6) (covering ordinary livestock and agricultural commodities) and entered an Order requiring Frozen Food Express to cease and desist from the unauthorized transportation thereof. Frozen Food Express filed a complaint in the District Court asking that the Commission be enjoined from enforcing the above Order. The Secretary of Agriculture intervened as a plaintiff. Numerous rail carriers and trucking associations and Armour & Company intervened as defendants in support of the Order of the Commission.

The District Court held that fresh and frozen dressed poultry came within the terms of the agricultural exemption and enjoined the Commission from enforcing so much of its order in Docket No. MC-C-1605 as relates to plaintiff's transportation of these commodities. The Court upheld the Commission's finding that fresh and frozen meat are not exempt and denied relief from the Commission's Order in respect to these commodities. This appeal is taken from so much of the Court's Order as enjoins the Commission from enforcing its Order in respect to the transportation by plaintiff of fresh and frozen dressed poultry.

THE SUBSTANTIALITY OF THE QUESTIONS

The issue in this case involves the interpretation to be placed on Section 203(b)(6) of the Act, particularly with respect to fresh and frozen dressed poultry. But to properly understand the importance of the issue in this matter, it ought to be considered along with the issues in the companion case No. 8285. It is, therefore, respectfully requested that the Jurisdictional Statements in these two very closely related matters be considered together. As a matter of fact, this case grows out of an attempt by the Commission to implement the determinations made by it which are involved in Case No. 8285. Because of this and the substantial identity of the parties, the cases were consolidated and heard on a single record in the court below.

Section 203(b)(6), often referred to in proceedings before the Commission and elsewhere as the "agricultural exemption" exempts from the economic regulatory powers of the Interstate Commerce Commission:

> ". . . (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish) or *agricultural commodities (not including manufactured products thereof)*, if such vehicles are not used in carrying any other property, . . . for compensation." (Emphasis supplied.)

As indicated before, the Court below in Case No. 8396 held, despite the fact that fresh and frozen dressed poultry are subjected to an intensive processing carried on in most instances in large off-the-farm industrial plants, that those items, contrary to the finding of the Interstate Commerce Commission, are agricultural products within the meaning of that term as used in Section 203(b)(6) of the Act. Because of this decision it follows—unless this Court reverses the Court below—that the transportation of those items by

the appellee, Frozen Food Express, is totally beyond the economic regulatory powers of the Commission. The issue, as here presented, is directly concerned only with the transportation activities of one motor carrier. However, from a practical standpoint, this issue arises in respect to all carriers claiming an exempt status and, as thus magnified, takes on an importance that extends far beyond the immediate problem of whether or not Frozen Food Express can transport fresh and frozen dressed poultry free from regulation by the Commission.

The problem of the exempt carrier, which today is threatening the effectiveness of the entire regulatory scheme, is one which has created manifold difficulties, inconveniences and trouble for the subjects of regulation, including the motor carriers and the railroads, and for the shippers and receivers of vast quantities of commodities which regularly move in the stream of commerce of this nation.

This problem has its genesis in the language used by Congress in stating the agricultural exemption. It is immediately apparent in examining the language of Section 203(b)(6) of the Act that Congress has used very broad and general language in describing the types of commodities having a farm origin which, when moving in for-hire transportation, are free of regulation and those which are subject to regulation. Assuming that Congress had a sound basis for exempting for-hire transportation of farm produce and other things grown on the farm, in order to permit the farmer who owned a truck to share its use with other farmers and thus reduce their marketing costs, nevertheless, the language of Section 203(b)(6) indicates that this objective was not intended to interfere with for-hire transportation handling manufactured or processed agricultural items. The legislative history of the section confirms this view.

From the very nature of the problem which involves the determination of literally an endless number of indi-

idual commodities, and from this general language used y Congress, it is most logical to conclude that Congress ntended the Commission to establish the line of demarca- ion between those commodities having a farm origin that re to be exempt and those which are to move in regulated ransportation. It is almost beyond imagination to think f any possible provision of law that by its very terms and y the inherent characteristics of the situation to which it s addressed, would more obviously call for a pattern of dministrative interpretation than does Section 20 (b)(6) f the Interstate Commerce Act. If, after viewing the lan- uage of the Section in the light of the complexities of the ituation with which it deals, there is any doubt as to this, he presence of the Section as part of an act providing a omprehensive scheme of regulation for one of the largest American industries should remove any vestige of doubt. Then too, it must never be forgotten that in 1940 Congress assed the National Transportation Policy which issued firm mandate to the Commission to interpret and ad- inister each and every section of all four parts of the nterstate Commerce Act so as to provide the nation with sound and flourishing transportation system.

Even superficial analysis makes it apparent that the ob of interpreting and administering the agricultral ex- mption is one that deals with a great deal more than ab- tract or theoretical definition of the term. The interpreta- on to be given the term must take into account an almost mitless number of practical considerations, relationships etween commodities and the processes to which they are ubjected, and, perhaps most important of all, the proper eshing of the exception with the other sections of the ct. It would seem, therefore, that any attempt to deal ith the Section on a piecemeal basis—that is to deter- ine independently whether a particular commodity is vered by the exemption—would almost certainly be oomed to failure. The history of the litigation before the

courts and the Commission where this was attempted proves this to be the case.

Moreover, the very procedure of piecemeal determination is itself incapable of resolving the uncertainty and confusion which exist in this area because, by its very nature, the decision must come after the act. The possibility of achieving a favorable interpretation as a result of litigation is unsatisfactory as a basis upon which a motor carrier is to determine whether or not to transport a particular commodity and whether or not to apply for authority to do so.

Not only would it seem virtually impossible to deal intelligently with the exemption on a piecemeal basis, but it would also seem to be equally unsatisfactory to attempt to arrive at any interpretation without a rich and deep-rooted background into the many facets of the problem. Experience with, and fundamental understanding of, the many ramifications involved would seem to be an essential foundation upon which to build a pattern of interpretation that would carry out the objectives of Congress, not only as stated in the exemption, but throughout the broad framework of the Act of which the agricultural exemption is one small but important part.

For these reasons, it becomes apparent that the interpretation of Section 203(b)(6), in the first instance, was intended to be, and must be, lodged with the Commission. Only the Commission, with its wide experience and its procedures for broad scale investigation, is equipped to consider the interrelationships among innumerable commodities and, in turn, the relationship of their transportation to the pattern of transportation regulation as a whole.

It was precisely this type of broad scale interpretation that was undertaken by the Commission in its investigation and determinations in *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511 (1951). The *Determination Case* provided the needed solution, but, until the determinations made therein are authoritatively established

as proper, it cannot be wholly effective.* Meanwhile, the process of piecemeal interpretation has continued in the courts and conflicting decisions in the circuits have tended to add to and magnify the difficulties of the problem already referred to. Without in anyway condemning these several courts, for admittedly the problems with which they have been confronted have been intricate and without landmarks to guide in their solution, their opinions dealing with the agricultural exemption have not been very helpful in dispelling the confusion and uncertainty surrounding the application of the exemption.

The basic fault lies in the fact that there has been no guiding principle to aid the courts in their attempt to formulate a proper interpretation of Section 203(b)(6). Were such a principle to be authoritatively enunciated, a great deal of the existing confusion would disappear. Unless this court sees fit to announce such a controlling principle the future seems to be one filled with the same time consuming and piecemeal litigation that has occurred in the past.

These Appellant Railroads believe that such a principle does exist and that its application to the agricultural exemption is both necessary and proper. This principle is a simple one and is one which has been announced by this court in such cases as *Piedmont & N. Ry. Co. v. Commission*, 286 U.S. 299 (1932); *MacDonald v. Thompson*, 305 U.S. 263 (1938); *Gregg Cartage Co. v. United States*, 316 U.S. 74 (1942) and *Crescent Express Lines v. United States*, 320 U.S. 401 (1943). It is to the effect that because of the great scope and complexities of the regulatory scheme of the Interstate Commerce Act and the many and extensive powers of the Commision which over the years have steadily been increased, all exemptions from regulation should be

* The pressing need for a review of the *Determination Case*, which will establish authoritatively the properness of the Commission's findings therein, is set forth in the Statement of Jurisdiction in Case No. 8285, filed concurrently herewith.

strictly construed so as to preserve and enhance regulatio rather than whittling it down or eroding it.

A review of the decision of the court below on the basi of the above principle and according to the Commission findings the weight to which they are entitled in view o the Commission's responsibility for the interpretation o the exemption would show that fresh and frozen dresse poultry are not agricultural commodities. But, more tha that, such a review would establish important standard for the guidance of courts in the future which would go long way toward putting an end to the confusion and un certainty which presently are preventing the agricultura exemption from taking its proper place in the regulator scheme.

CONCLUSION

The Appellant Railroads respectfully submit that th Supreme Court has jurisdiction to review this decision b direct appeal from the District Court under the statutor provisions and the cases cited above. The appellants fur ther submit that the issues presented by this case are o the requisite substantiality to warrant decision by the Su preme Court. The primary question in this case involve the interpretation which is properly to be placed upon Sec tion 203(b)(6) of the Interstate Commerce Act which ex empts motor carriers transporting agricultural commoditie from the economic regulatory powers of the Interstat Commerce Commission. More specificallly, it involves th question of whether or not fresh and frozen dressed poultr are "agricultural commodities" within the meaning of thi Section.

But the importance of this Court's review is not limite to such a narrow issue. Rather, a review by this Cour would necesarily serve as a guide for the future and thu

alleviate the confusion and uncertainty which presently surround the interpretation of the exemption and threaten the effectiveness of the Commission's administration of the entire scheme of transportation regulation.

Respectfully submitted,

MARGARET P. ALLEN,
EDWIN N. BELL,
JOSEPH H. HAYS,
CARL HELMETAG, JR.,
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CHARLES P. REYNOLDS,
Attorneys for Class I Railroads, Intervening Defendants.

1740 Suburban Station Bldg.,
Philadelphia 4, Penna.

Filed: June 17, 1955.

CERTIFICATE OF SERVICE

I, Carl Helmetag, Jr., one of the attorneys for the Class I Railroads, intervening defendants (appellants) herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Statement of Jurisdiction on the several parties to this action as follows:

1. On the plaintiff, Frozen Food Express, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, Carl L. Phinney and Leroy Hallman, First National Bank Building, Dallas, Texas;

2. On the Secretary of Agriculture, as intervening plaintiff, by mailing copies in duly addressed envelopes, with postage prepaid, to his attorneys of record, Charles W. Bucy, Walter D. Matson, and Harry Ross, Office of the Solicitor, U. S. Department of Agriculture, Washington 25, D. C.;

3. On the Interstate Commerce Commission, defendant, by mailing copies in duly addressed envelopes, with postage prepaid, to its attorneys of record, Edward M. Reidy and Leo H. Pou, at the office of the Interstate Commerce Commission, Washington 25, D. C.

4. On the United States of America, defendant, by mailing copies in duly addressed envelopes, with postage prepaid, to its attorneys of record, Honorable Stanley N. Barnes, Assistant Attorney General, and Messrs. James E. Kilday and Charles S. Sullivan, Jr., U. S. Department of Justice, Washington 25, D. C.; by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its attorney of record, Malcolm R. Wilkey, United States Attorney, Houston, Texas; and by mailing a copy in a duly

addressed envelope, with postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.

5. On the several intervening defendants, by mailing copies in duly addressed envelopes, with postage prepaid, to their respective attorneys of record, to wit: David G. MacDonald and Francis W. McInerny, Commonwealth Building, 1625 K Street, N. W., Washington 6, D. C.; Peter T. Beardsley and Fritz Kahn, c/o American Trucking Associations, Inc., 1424 Sixteenth Street, N. W., Washington 6, D. C.; Dale C. Dillon and Clarence D. Todd, 944 Washington Building, Washington 5, D. C., and by mailing copies in duly addressed envelopes, with air mail postage prepaid, to Rollo E. Kidwell, 301 Empire Bank Building, Dallas, Texas; and Lee Reeder, 1012 Baltimore Avenue, Kansas City 5, Missouri.

This 17th day of June, 1955.

CARL HELMETAG, JR.

APPENDIX "A"

LIST OF CLASS I RAILROADS

The below listed Railroads are the individual carriers which, together, are designated in the Statement of Jurisdiction as "Class I Railroads," the intervening defendants appealing herein. When used, the terms "Class I Railroads" or "Appellant Railroads" include each of these named Railroads:

The Atchison, Topeka & Santa Fe Railway Company
Atlantic Coast Line Railroad Company
Chicago & Illinois Midland Railway Company
Chicago and Northwestern Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago Great Western Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
The Denver and Rio Grande Western Railroad Company
Duluth, South Shore and Atlantic Railway Company (C. L. Solether, Trustee)
Elgin, Joliet and Eastern Railway Company
Florida East Coast Railway Company (John W. Martin, Trustee)
Fort Dodge, Des Moines & Southern Railway Company
Great Northern Railway Company
Green Bay & Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
The Kansas City Southern Railway Company
Midland Valley Railroad Company
The Minneapolis & St. Louis Railway Company

Minneapolis, St. Paul & Sault Ste. Marie Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company (Guy A. Thompson, Trustee)
The Nashville, Chattanooga & St. Louis Railway
Northern Pacific Railway Company
St. Louis-San Francisco Railway Company
St. Louis Southern Railway Company
Seaboard Airline Railroad Company
Southern Railway Company
Southern Pacific Company
The Texas and Pacific Railway Company
Toledo, Peoria & Western Railroad
Union Pacific Railroad Company
Wabash Railroad Company
The Western Pacific Railroad Company

APPENDIX "B-1"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 8285
and
Civil Action No. 8396.

FROZEN FOOD EXPRESS,
Plaintiff,

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES,
Intervening Plaintiff,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants,

COMMON CARRIER IRREGULAR ROUTE CONFERENCE OF AMERICAN TRUCKING ASSOCIATION, ET AL.,
Intervening Defendants.

Phinney and Hallman (Carl L. Phinney), of Dallas, Texas; for Plaintiff.

Stanley N. Barnes, Assistant Attorney General, and Charles W. Buey, Associate Solicitor, of Washington, D. C.; for Intervening Plaintiff.

Malcolm R. Wilkey, United States Attorney, of Houston, Texas, and Edward M. Reidy, Chief Counsel of Interstate Commerce Commission, of Washington, D. C.; for Defendants.

Callaway, Reed, Kidwell & Brooks (Rollo E. Kidwell), of Dallas, Texas;

Todd, Dillon & Curtiss (Clarence D. Todd), of Washington, D. C.;

Peter T. Beardsley, of Washington, D. C.;

Baker, Botts, Andrews & Shepherd (J. C. Hutcheson, III and Edwin N. Bell), of Houston, Texas;

Macleay & Lynch (Francis W. McInerny), of Washington, D. C.;

Reeder, Gisler & Griffin (Lee Reeder), of Kansas City, Missouri;

J. W. Nisbet, of Chicago, Illinois;

Carl Helmetag, Jr., of Philadelphia, Pa.;

Rice, Carpenter & Carraway, of Washington, D. C.;

Fulbright, Crooker, Freeman, Bates & Jaworski (W. H. Vaughan, Jr.), of Houston, Texas; for Intervening Defendants.

JANUARY 26, 1955.

Before HUTCHESON, *Chief Circuit Judge* and CONNOLLY and KENNERLY, *District Judges.*

CONNALLY, *District Judge:*

Filed pursuant to Secs. 1336, 1398, and 2321-2325, of Title 28; to Sec. 1009, of Title 5; and to Sec. 305(g), of Title 49, U. S. C. A., each of the foregoing civil actions attacks and seeks to restrain enforcement of an order of the Interstate Commerce Commission. Presenting the same question of law, and substantial identity of parties, the actions were consolidated for hearing and trial. The question for determination is whether a number of different commodities, as later noted herein, all of which have their origin on the farm or ranch, fall within the scope of the so-called agricultural exemption (Sec. 303(b)(6)) of Part II of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 301,

et seq.). By terms of the last-mentioned statute, motor vehicles used in carrying property consisting of "ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)", are exempt from Interstate Commerce Commission control (save for minor exceptions not here pertinent). The plaintiff in each of the consolidated actions, being a trucking concern holding a certificate of convenience and necessity from the Commission, desires to carry some or all of the commodities in question, unrestricted by the terms of its own certificate, or by other Commission regulation. Hence the plaintiff, supported to a considerable extent in this contention by the Secretary of Agriculture of the United States, urges upon the Court a broad interpretation of the statutory language "agricultural commodities (not including manufactured products thereof)", which would have the net result of enlarging this so-called agricultural exemption. The Commission, on the other hand, and those intervenors who align themselves with the Commission, urge upon us that most of the commodities in question, by virtue of the treatment and processing which they receive, either have lost their identity as "agricultural commodities", or have become "manufactured products thereof". The result of this argument is drastically to restrict the scope of the exemption.

CIVIL ACTION 8285.

In June, 1948, the Interstate Commerce Commission, of its own motion, instituted a proceeding, being MC-C-968 on its docket, in the nature of an investigation, to determine the meaning and scope of the term "agricultural commodities (not including manufactured products thereof)", as used in the above-mentioned statute. The proceeding was widely noticed in the affected trades and industries. Many interested parties, including the Secretary of Agriculture of the United States, the Commissioners of Agri-

culture from a number of the States, associations of shippers, motor carriers, and others, intervened. After extended hearings, during which much expert testimony was offered as to the manner and method of cleaning, preparing, packaging, and otherwise processing the various commodities in question, the Commission issued its report and order entitled "Determination of Exempted Agricultural Commodities" (52 I. C. C. Reports, Motor Carrier Cases, 511-566). In such report, the Commission announced its definition of such statutory term,[1] which definition it then undertook to apply to the various commodities under consideration, and enumerated those which it found to come within the statutory language, and those which it found to fall without.[2] Thereupon, the proceeding was terminated and removed from the Commission docket.

1. "In No. MC-C-968, we find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203(b)(6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations."

2. "We find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203 (b)(6) includes: (1) fruits, berries, and vegetables which remain in their natural state, including those packaged in bags or other containers, but excluding those placed in hermetically sealed containers, those frozen or quick frozen, and those shelled, sliced, shredded, or chopped up; (2) fruits, berries, and vegetables dried naturally or artifically; (3) seeds, including inoculated seeds, but not seeds prepared for condiment use or those which have been deawned, sacrificed or otherwise treated for seeding purposes; (4) forage, hay, straw, corn and sorghum fodder, corn cobs, and stover; (5) (a) hops and castor beans, and (b) leaf tobacco, but excluding redried tobacco leaf; (6) raw peanuts, and other nuts, unshelled; (7) whole grains, namely, wheat, rye, corn, rice, oats, barley and sorghum grain, not including dehulled rice and oats, or pearled barley; (8) (a) cotton in bales or in the seed, (b) cottonseed and flaxseed, and (c) ramie fiber, flax fiber, and hemp fiber; (9) live poultry, namely, chickens, turkeys, ducks, geese, and guineas; (10) milk, cream, and skim milk, including that which has been pasteurized, standardized milk, homogenized milk and cream, vitamin 'D' milk, and vitamin 'D' skim milk; (11) wool and mohair, excluding cleaned and scoured wool and mohair; (12) eggs, including oiled eggs, but excluding: whole or shelled eggs, frozen or dried eggs, frozen or dried egg yolks, and frozen or dried egg albumin; (13) (a) trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, and (b) crude resin, maple sap, bark, leaves, Spanish moss, and greenery; (14) sugar cane, sugar beets, honey in the comb, and strained honey."

The plaintiff Frozen Food Express was not a party to the proceeding before the Commission. By amended complaint filed here July 12, 1954, plaintiff alleges that it desires to carry agricultural commodities (not including manufactured products thereof) for hire, to and from all points within the United States, irrespective of the limitations imposed by its own certificate; that the report of April 13, 1951, deprives plaintiff of its right to do so. Alleging that the action of the Commission, in entering the report in question, was arbitrary, capricious and unreasonable, that it constituted an abuse of discretion and a violation of the Commission's statutory powers, the plaintiff here seeks an injunction to restrain the Commission and the United States from enforcing or recognizing the validity of such report; restraining interference with the plaintiff's proposed transportation of such agricultural commodities (not including manufactured products thereof), and seeks an order of this Court declaring the report of the Commission of April 13, 1951, to be null and void.

The Secretary of Agriculture has intervened, denominating himself "Intervening Plaintiff". He makes common cause with plaintiff in contending that a number of commodities[3] are within the exemption. Several trucking associations, and some sixty southern and western railroad companies, have intervened. These intervenors take a contrary view, and support the report of the Interstate Commerce Commission.

We are of the opinion that the action may not be maintained, and must be dismissed, for the reason that the report and order of the Interstate Commerce Commission of April 13, 1951, is not an "order" subject to judicial re-

3. "(1) Slaughtered meat animals and fresh meats;
(2) Dressed and cut-up poultry, fresh or frozen;
(3) Feathers;
(4) Raw, shelled peanuts and raw shelled nuts;
(5) Hay chopped up fine;
(6) Cotton linters and cottonseed hulls;
(7) Frozen cream, frozen skim milk, and frozen milk;
(8) Seeds which have been dewinged, sacrificed, or innoculated."

view under any of the statutes cited. The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only "order" entered was one discontinuing the proceeding and removing it from the Commission's docket. The question is controlled by *U. S. v. Los Angeles R. R. Co.* (273 U. S. 284), holding a very similar "order" of the Interstate Commerce Commission which found, after an investigation, the value of certain railroad properties, not to be subject to review. The language of Mr. Justice Brandeis, speaking for a unanimous Court there, aptly describes the order in issue here:

> "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation."

The proponents of jurisdiction here rely upon *Columbia Broadcasting System v. U. S.* (316 U. S. 407). It was there held that an order of the Federal Communications Commission promulgating certain rules and regulations requiring that the Commission deny a license to broadcasting stations under certain circumstances, was subject to judicial review, upon a showing by the complaining party of strong equitable considerations. This authority is clearly

distinguishable from the present case. The order there in question was entered in the exercise of the agency's rule-making power. Such orders, together with those fixing rates and those determining controversies before the administrative body, have long been recognized as subject to review (*U. S. v. Los Angeles R. R. Co.*, supra).

Likewise, the complaining party there showed an immediate and continuing threat of irreparable injury if the order were not reviewed. It is not so here. The statement of plaintiff that it desires to carry for hire most or all of the commodities on the Commission's proscribed list, and that if it does so, the Commission likely will seek injunctive relief to restrain plaintiff, shows no basis for the intervention of a court of equity. Plaintiff will have an adequate remedy in the event of such interference.

It follows that Civil Action 8285 will be dismissed.

Civil Action 8396:

A complaint was filed December 23, 1953, with the Interstate Commerce Commission by East Texas Motor Freight Lines, Gillette Motor Transport, Inc., and Jones Truck Lines, Inc., charging that Frozen Food Express was and had been engaged in transporting fresh and frozen dressed poultry, and fresh and frozen meats, and meat products, for hire, between points in interstate commerce not authorized by its certificate of convenience and necessity. Frozen Food readily admitted that it had been so engaged, but defended on the theory that such products all were within the agricultural exemption. The Commission found each of these products not to be within the exemption, and ordered Frozen Food Express to cease and desist from such unauthorized transportation. The present proceeding was filed by Frozen Food Express to review that order.[5]

While the present action was pending in this Court, the Secretary of Agriculture of the United States filed with

5. Plaintiff has abandoned the contention that meat products are within the agricultural exemption, and this commodity will not be further considered here.

the Commission his petition for leave to intervene, pursuant to Sec. 1291, of Title 7, U. S. C. A. This request was denied; and the Secretary appears here as "Intervening Plaintiff", contending (1) that the proceedings before the Commission were null and void by reason of the failure of the Commission to notify him of the pendency thereof (Sec. 1291(a), of Title 7, U. S. C. A.); (2) that the proceedings should be remanded to the Commission by reason of its error of law in having denied him leave to intervene; and (3) that the cease and desist order should be enjoined by reason of the alleged error of the Commission in holding fresh and frozen meats, and fresh and frozen dressed poultry, to be beyond the limits of the agricultural exemption.

The rail carriers and trucking associations which intervened in Civil Action 8285, also appear in this action. They support the Commission, and oppose the position taken by the plaintiff and the Secretary of Agriculture.

Armour & Company, being engaged at various points in the United States in the slaughter of livestock and the killing, dressing, and sale of poultry, has intervened, urging that dressed poultry is an exempt commodity, that meat is not.

The position taken by the Secretary of Agriculture that the proceeding before the Commission was null and void in its entirety by reason of the failure of the Commission to give him notice thereof, need not long detain us. The proceeding there was not one with respect to "rates, charges, tariffs, and practices" relating to the transportation of farm products, and hence was not one of which the Secretary was entitled to notice under the statute (Secs. 1291 and 1622, of Title 7, U. S. C. A.). *U. S. v. Pa. R. R. Co.* (242 U. S. 208); *B. & O. R. R. Co. v. U. S.* (277 U. S. 292); *Mo. Pac. R. R. Co. v. Norwood* (283 U. S. 249). The Commission likewise did not commit an error of law in denying the Secretary's Petition of Intervention, filed there while the present proceeding was pending here.

Most able and exhaustive treatment is given the question now before us, in so far as it concerns dressed poultry, by Judge Gavin of the United States District Court for the Northern District of Iowa, in *I. C. C. v. Kroblin* (113 F. Supp. 599, aff. 212 F. 2d 555, cert. den. Oct. 14, 1954). Reviewing the long struggle between the Interstate Commerce Commission in its efforts to restrict the application of the exemption in question, and the Department of Agriculture and others in seeking to expand it; reviewing the legislative history of the Motor Carrier Act of 1935, and various proposed amendments thereto; and considering the congressional intent which prompted the insertion of the agricultural exemption, Judge Gavin concluded that dressed poultry constituted an "agricultural commodity", and did not constitute a "manufactured product thereof". Hence, such commodity was within the exemption. It is sufficient to state that we agree with those conclusions as to fresh and frozen dressed poultry.

Counsel for the Commission urges that this Court should disregard the *Kroblin* case, on the argument that the only question before us is one of the adequacy of the evidence before the Commission. It is said that the order which was entered was one within the general purview of the Commission's authority, and that if its findings are supported by "substantial evidence", this Court has no alternative but to leave it undisturbed. While we do not quarrel with such statement as a general proposition of law, the argument is not convincing in its application to the present record. The primary facts before the Commission were without dispute and were the subject of stipulation. Reduced to simplest form, they showed that before a chicken or duck became "dressed poultry", the bird was killed, his feathers and entrails removed, he was chilled, and in some cases frozen, packaged, etc. In addition, such "facts" consisted of evidence of so-called "expert" nature, that this treatment or processing of the chicken or duck rendered him a "manufactured product".

It is apparent that there is only one ultimate finding called for, namely, whether under the type of processing reflected by the record, the product falls within the statutory definition. The question then is a mixed one of law and fact, calling for the application of the processes of legal reasoning and of principles of statutory construction. The fact that the Commission's findings are supported by an "expert" who gives his opinion that a dressed chicken is a manufactured product, does not foreclose the question, nor remove it from the scope of judicial review. *Baumgartner v. U. S.* (322 U. S. 665); *Lehmann v. Acheson* (206 F. 2d 592, 3C); *Galena Oaks Corp. v. Schofield* (— F. 2d —, 5C, Dec. 29, 1954, as yet unreported).

In our opinion, fresh and frozen meat does not fall within the category either of "ordinary livestock" or of "agricultural commodities", and hence is not within the exemption. Since the enactment of Part II of the Interstate Commerce Act in 1935, motor vehicles used exclusively in carrying "livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof)", have been exempt. By amendment in 1940, the term "ordinary" was inserted immediately before the word "livestock". The term "ordinary livestock" is defined in Sec. 20(11) of the Act as "all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses".

Referring only to the live animals, "ordinary livestock" may not be tortured to include the carcasses of slaughtered meat animals, or the meat which is the product of butchering. Meat has been regarded generally in the industry as a controlled commodity for some twenty years. Congress has dealt with the agricultural exemption on many occasions. Considering the ease with which the Congress might have added appropriate language to evidence its intent to exempt fresh or frozen meat from Interstate Commerce Commission control, if it so desired, the absence of such language indicates that no such intent was entertained.

Nor may meat, fresh or frozen, be considered an "agricultural commodity" for present purposes. The exemption has treated the live meat animal in a separate generic class from "agricultural commodity" since the enactment of the statute; and if the live animal, on entering the slaughter pen or the packing house, is not an "agricultural commodity", we are unable to see how he becomes one on emerging therefrom in the form of beef or pork. The Commission was correct, in our opinion, in holding fresh and frozen meat to be non-exempt.

The enforcement of the order of the Interstate Commerce Commission, MC-C-1605, East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express, is enjoined and restrained in so far as said order interfered with, enjoins or restrains the plaintiff Frozen Food Express from transporting fresh and frozen dressed poultry in interstate commerce (when the motor vehicles used in carrying such poultry are not used for carrying any other property or passengers for compensation). Other relief sought by plaintiff is denied.

Clerk will notify counsel.

Done at Houston, Texas, this 26th day of January, 1955.

JOSEPH C. HUTCHESON JR.
Chief Judge, Fifth Circuit
BEN C. CONNOLLY
United States District Judge
J. M. KENNERLY
United States District Judge
Concurring in Part and Dissenting in Part

TRUE COPY I CERTIFY

V. BAILEY THOMAS, *Clerk*

ATTEST:

By EDWARD A. BLYTHE,
Deputy Clerk

KENNERLY, *District Judge:*

Concurring in part and dissenting in part.

I concur with all the foregoing opinion except the decision in Civil Action 8396 with respect to fresh meat and frozen meat. As to that I respectfully dissent.

I think all of Section 303(b) should be given a broad and liberal construction, and that Section 303(b)(6) should be construed as including fresh meat and frozen meat. I think we should not only follow the reasoning of both the District Court and Court of Appeals in the Kroblin case with respect to dressed poultry and frozen dressed poultry, but that what is said is also applicable to fresh meats and frozen meats.

J. M. KENNERLY, *Judge*

Filed 26 day of Jan., 1955.

V. BAILEY THOMAS, *Clerk*
By RUBY MILLER, *Deputy*

TRUE COPY I CERTIFY

ATTEST:

V. BAILEY THOMAS, *Clerk*
By EDWARD A. BLYTHE,
Deputy Clerk

APPENDIX "B-2"

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION No. 8396

FROZEN FOOD EXPRESS, ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Defendants.

Judgment

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on November 16, 1954, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on January 26, 1955, filed herein its opinion, containing its findings of fact and conclusions of law; now, in accordance with the said opinion, findings, and conclusions, it is hereby

ORDERED, ADJUDGED, AND DECREED as follows:

(1) The defendants, the United States of America and the Interstate Commerce Commission, be, and they hereby

are, enjoined and restrained from enforcing the order of the said Commission entered July 13, 1954, in a proceeding docketed by the Commission as No. MC-C-1605, and entitled "East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express", insofar as the said order requires the said Frozen Food Express to cease and desist from transporting, or interferes with its transportation of, fresh and frozen dressed poultry in interstate commerce for compensation unless the motor vehicle used in the carrying of such poultry is at the same time being used to carry for compensation passengers or other property not within the exemption provided in section 203(b)(6) of the Interstate Commerce Act (49 U. S. C. 303(b)(6)); and

(2) All other relief sought by the plaintiffs herein, including the Secretary of Agriculture as intervening plaintiff, be, and the same hereby is, denied.

This the 23rd day of February, 1955.

/s/ JOSEPH C. HUTCHESON, JR.,
Chief Judge, United States Court of Appeals for the Fifth Circuit.

/s/ THOMAS M. KENNERLY,
United States District Judge.

/s/ BEN C. CONNALLY,
United States District Judge.